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No. 75-1537

# In the Supreme Court of the United States

OCTOBER TERM, 1976

ERIC BLITZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-38) is reported at 533 F. 2d 1329.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 1976. The petition for a writ of certiorari was filed on April 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the indictment was defective because certain evidence favorable to petitioner was not presented to the grand jury.

2. Whether the trial court abused its discretion by denying petitioner's motion for a severance.

3. Whether a loan is "compensation" for the purpose of the Investment Company Act of 1940, 54 Stat. 815, as amended, 15 U.S.C. 80a-17(e)(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of accepting compensation other than his stated salary for the purchase of property for an investment company, in violation of 15 U.S.C. 80a-17(e)(1) and 80a-48.[1] He was sentenced to one year's imprisonment and fined $5,000. The court of appeals affirmed in a comprehensive opinion.

In the early spring of 1971, George Van Aken took control of Elinvest, Inc., a shell corporation possessing virtually no assets, and began to manipulate the supply of and demand for Elinvest stock. He attempted to inflate the price of Elinvest shares, after which he and his associates planned to sell their shares for handsome profits (Pet. App. A-6 to A-8).

Van Aken enlisted the aid of petitioner, the vice-president and portfolio manager of the Astron Fund, a mutual fund. Van Aken offered petitioner $25,000 if petitioner would arrange for Astron to purchase (for $5 per share) 25,000 shares of Elinvest stock (Pet. App. A-8).[2]

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[1]Petitioner was indicted on several counts of a 25-count indictment with fourteen other people. Eight of these (including George Van Aken, the engineer of the conspiracy and the government's principal witness) pleaded guilty prior to trial to various counts. Two defendants were severed, and petitioner was tried with four others. He was found not guilty of substantive offenses charging mail fraud and securities fraud. At the close of all of the evidence, the court dismissed a conspiracy charge against petitioner and certain securities fraud offenses against all defendants (Pet. App. A-2 to A-4 and n. 4).

[2]Petitioner had complete control over Astron's investments (Pet. App. A-8 n. 11).



Petitioner agreed. Van Aken said that the money would be paid as soon as the purchase was completed (*ibid.*).

On June 9, 1971, petitioner caused Astron Fund to purchase the 25,000 shares from Van Aken's father-in-law. Van Aken apparently reaped $75,000 from this purchase.[3] Van Aken gave petitioner a check for $25,000, post-dated to the day that payment was due on Astron's Elinvest purchase (Pet. App. A-9).[4]

Nine months later, Van Aken called petitioner and told him that the Securities and Exchange Commission was investigating trading in Elinvest. He suggested that petitioner could protect both of them by returning the $25,000, which then could be proclaimed a "loan" (Pet. App. A-9 to A-10). Petitioner replied that he did not have the money and later refused to accept Van Aken's calls (Pet. App. A-10). Petitioner told one of Van Aken's associates that Van Aken's demand for the return of the money was "unfair" (Pet. App. A-10 n. 13). In August 1972, however, petitioner repaid the money with interest, accompanying the repayment with a letter stating that the money had been a loan (Pet. App. A-10).

## ARGUMENT

1. Petitioner contends that the indictment was defective because the grand jury was not informed of certain evidence favorable to him, including the facts that

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[3]Van Aken originally had arranged for Bradley, his father-in-law, to supply $50,000 of the money necessary to gain control of Elinvest. The two had agreed that Bradley would receive the first $50,000 of return, and that Van Aken would receive any surplus (Pet. App. A-7).

[4]Van Aken testified that he asked petitioner to have Astron purchase an additional 2,000 shares of Elinvest "to lighten the position that one of the market makers had" (Pet. App. A-9 n. 12). This indicates that petitioner was aware of the method by which Van Aken was driving up the price of Elinvest shares (*ibid.*).

he had testified before another grand jury and that he had been acquitted on an unrelated but similar stock manipulation charge. This contention fails because it was not made before trial, as Fed. R. Crim. P. 12(b)(2) requires.

Moreover, it is settled that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence" (*United States* v. *Calandra*, 414 U.S. 338, 345). See also *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, slip op. 6-7 (plurality opinion). The arguments made by petitioner do not detract from the facial validity of the indictment.

2. Petitioner contends that the trial court should have granted his motion for a severance. He argues that the government joined him in the conspiracy count in bad faith, attempting to link him to the unsavory activities of Van Aken and his henchmen (Pet. 35-36). The contention is inaccurate.

The conspiracy alleged involved stock manipulation, mail fraud and securities fraud.[5] The fact that petitioner had accepted a $25,000 bribe from the major conspirator was sufficient to establish the prosecution's good faith belief that it could link petitioner with the rest of the joint venture. The court of appeals therefore properly held, after reviewing the evidence, that there was (Pet. App. A-31):

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[5]Petitioner's case could have been properly joined in this indictment even if no conspiracy had been alleged. The violation of the Investment Company Act was one of a number of charges against petitioner arising out of the "same series of acts or transactions constituting an offense or offenses" comprising the Elinvest manipulations. Fed. R. Crim. P. 8(b). See *United States* v. *Granello*, 365 F. 2d 990, 993-995 (C.A. 2), certiorari denied, 386 U.S. 1019.



> a sufficient basis for the government in good faitl to have believed that it could prove that [petitioner] who had been paid a $25,000 bribe to cause [Astron] to purchase Elinvest stock and who knew Van Aker from past dealings, thought that he was the "unload ing" part of a larger conspiracy to manipulate th price of Elinvest when he took the bribe.

In any event, petitioner has failed to demonstrate that he suffered any cognizable prejudice from the joinder. He does not challenge the sufficiency of the evidence on which he was convicted. The court of appeals noted that the district court "carefully distinguished [petitioner's] case from those of the other defendants" (Pet. App. A-31). The jury demonstrated its ability to distinguish among offenses and offenders by acquitting petitioner on all but a single charge. Accordingly, petitioner has failed to show that the court abused its discretion by denying his motion for severance. *Schaffer* v. *United States*, 362 U.S. 511.

3. Petitioner argues (Pet. 50-61) that the trial court incorrectly instructed the jury that it could find him guilty even if the $25,000 payment from Van Aken was a bona fide loan. He contends that a "loan" cannot be "compensation" within the meaning of 15 U.S.C. 80a-17(e)(1). The court of appeals properly rejected the argument (Pet. App. A-33 to A-34). No other court of appeals has passed upon the issue, and consequently there is no reason for this Court to consider it.

The payment to petitioner was "compensation" to petitioner because it was a thing of value given in exchange for petitioner's assistance to Van Aken. The Investment Company Act of 1940 is designed to ensure that individuals in a position to manage other people's money have undivided loyalty. The independent judgment of an investment company advisor may be as subverted

as readily by a timely "loan" of this sort as by an outright bribe.[6] See also 15 U.S.C. 80a-1(b)(1) and (2).

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]Petitioner's suggestion (Pet. 58) that the Investment Company Act is unconstitutionally vague is insubstantial. See generally *United States* v. *Powell*, 423 U.S. 87.